88-2106
No. _____

Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DAVID ROSENBERG
Petitioner

v.

COMERICA BANK
Respondent

AND RECUSAL OF JUDGE RICHARD ENSLEN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

David Rosenberg, Pro Se
630 Alfa Court, 3A
Kalamazoo, Michigan 49002
(616) 343-7130

QUESTIONS PRESENTED FOR REVIEW

1. Was Judge Enslen's (U.S.D.C.) conduct proper by conducting an appeal in a case where his wife is an attorney in the law firm which was respondent's attorneys in this litigation?

2. Was Judge Enslen's (U.S.D.C.) denial to recuse himself proper when he was request to do so?

3. Was Judge Enslen's (U.S.D.C.) denial of the appeal and issuing a fatal opinion proper?

4. Did Judge Enslen (U.S.D.C.) err in computing the time for filing the appeal under Bankruptcy Code 9006A; Federal Rule 6(a)?

5. Did the Bankruptcy Court act properly by granting Comerica Bank's request under Rule 60(b) to set aside the abandonment?

6. Did the Bankruptcy Court have any right to conduct a trial and deny a jury trial when the Abandonment Order was under appeal?

7. Was the appeal to the 6th Circuit Court of Appeals timely? The appeal was timely filed except for a cashier's check which was not endorsed. Therefore, should the 6th Circuit Court of Appeals treat that as clerical error and 28 USC 2111 Harmless Error, and not as untimely and deny proper appeal?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DAVID ROSENBERG

Petitioner

VERSUS

COMERICA BANK
AND RECUSAL OF JUDGE RICHARD ENSLEN

Respondent

PETITION FOR WRIT OF CENTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, David Rosenberg, State of Michigan, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted in this case.

OPINIONS BELOW

The Opinion of the 6th Circuit Court of Appeals filed the 19th day of May, 1989 was in error when they did not consider the recusal under mandamus properly as under C.A. 7 (I11.) 1986, 782 F2D 710, where it shows the only remedy to recuse a judge's erroneous refusal to recuse himself.

Under 28 USC 2111 the 6th Circuit Court of Appeals should have considered the unsigned cashier's check as a clerical error and not deny the appeal as untimely.

JURISDICTION

Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ Of Certiorari through the authority of 28 USC Sec. 2101 (c).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of. . . property, without due process of law . . .

United States Constitution, Amendment VII:

> . . . be deprived of a jury trial . . . without due process of law . . .

STATEMENT OF THE CASE

The Petitioner, David Rosenberg, In Pro Se, Asks this Honorable Supreme Court of the United States to grant him certiorari to appeal the decision of the 6th Circuit Court Of Appeals, entered on the 19th day of May, 1989, File #88-1997, which denied my appeal for recusal of Judge Enslen of the United States District Court for the Western District of Michigan whereby he failed to disqualify himself and point out that he had a conflict of interest and should have disqualified himself under 28 USC Sec. 455 (b) (5). His spouse is an attorney with the law firm of Miller, Canfield, Paddock And Stone, the law firm which represented the Respondent Comerica Bank in this appeal from the Bankruptcy Court. The 6th Circuit Court Of Appeals failed to take action against the Judge under Mandamus to recuse himself.

> "Mandamus is only method of correcting district judge's erroneous refusal to recuse himself under U.S.C.A Sec. 455(a), which

requires judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned."

Union Carbide Corp. v. U.S. Cutting Service, Inc.
C.A. 7 (I11.) 1986, 782 F2d 710

"Standard to be applied in interpreting this section requiring judge to disqualify himself in any proceeding in which his impartiality might reasonable by questioned is whether reasonable person knowing all circumstances would be led to conclusion that judge's impartiality might be reasonably questioned; such standard is broad enough to require recusal not only where partiality is in fact present, but also where only appearance of partiality is present."

Dobson v. Camden, D.C. Tex.
1980, 502 F. Supp. 679

" . . . . any doubt should be resolved in favor of granting an application to set aside the order, to the end of securing a resolution of the matter on the merits . ."

Huntington Cab Co. V. Am. Fidelity & Casualty Co.
4 FRD 496 (DC WVa 1945)

I feel the 6th Circuit Court of Appeals erred by treating the appeal as untimely under Rule 26 (b) Fed. R. App. P. instead of treating is as clerical error, which should have been proper, as all documents were filed timely. Therefore, justice should not be denied.

In this appeal from the Bankruptcy Court the property was abandoned by the Trustee under Title 11, Sec. 554 and the proper notice was given to the parties within 20 days of this abandonment and no objection was made by any party, this abandonment would be final and no reversal shall be had under Rule 554. When the property is abandoned by the Trustee, it reverts back to the original owner.

Title 11, Sec. 554 (c):

"Abandonment may be to any party with a possessory interest in the property abandoned. Property which has been abandoned because schedule had not been administered, it has been said, is deemed abandoned to debtor. This result apparently follows prior law which gave the bankrupt the right to assert title to property of the estate upon abandonment by the trustee. Such revesting of title may be irrevocable, in light of cases decided under the 1898 Act indicating that the trustee is precluded from reclaiming property

of the estate which has already been abandoned, moreover, there is authority under the Bankruptcy Act of 1989 to the effect that the abandonment relates back to the date of filing of the petition."

Title 11, Sec. 554 (39):

"Abandonment of bankrupt's property by trustee completely divested trustee of all rights in the property and the title was thenceforth regarded as bankrupt's just as if he had never been in bankruptcy and no subsequent enhancement of value of the property gave trustee a right to reclaim it."

Title 11, Sec. 554 (41):

"Abandonment of property by the trustee does not divest Bankruptcy Court of jurisdiction to enforce the rights of debtors exemption after their exemption in the property."

Title 11, Sec. 554 (61):

"If made knowingly, abandonment of property by the trustee is irrevocable and the trustee is absolutely precluded from reclaiming abandoned property."

"Bankruptcy Court has no jurisdiction over abandoned property in the hands of the bankruptcy." *In Re Tarpley, Bkrtcy., Tenn., 1980 4 B.R. 145.*

I, David Rosenberg, was the sole stockholder of this corporation and also was the debtor. Therefore, there should not be any doubt who the debtor and

owner of this property is. It did not give any right to the Court nor the trustee to set aside the abandonment and sell property which was no longer in bankruptcy.

26 USCS 1371 (A):

"Small Business Corporation. For purpose of this subchapter, the term "small business corporation" means a domestic corporation which is not a member of an affiliated group (as defined in Sec 1504 (26 USCS 1504) and which does not have (1) more than fifteen (15) shareholders."

After seven (7) months Comerica Bank filed a Petition with the Bankruptcy Court under Rule 60(b) to set aside the abandonment and Petitioner filed an appeal to the United States District Court for the Western District of Michigan, which was assigned to Judge Enslen.

The Bankruptcy Court held a trial, over my objections, while this case was under appeal, and denied me a trial by jury, which I requested, and disregarded the Rules of the Bankruptcy Code that

once an appeal is taken, the Bankruptcy Court has no further jurisdiction to try the case or to issue any other Orders

Title 11 Sec. 8001 Jurisdiction. Property filed notice of appeal immediately acts to transfer jurisdiction from trial court to court of appeals with regard to any matters involved in appeal and divest lower court of jurisdiction to proceed further with such matters. In Re Bialac, Bkrtcy.App.Ariz. 1981, 15 B.R. 901, affirmed 694 F2d 625.

The Bankruptcy Court found that all properties belonged to Comerica Bank, over my objections and proof that Comerica Bank was not a secured creditor anymore as they were paid off their share by the Small Business Administration in April, 1982. All of this fell on deaf ears.

After the trial, Judge Enslen issued his Opinion and indicated that the appeal was untimely and that he did not have any power to make any ruling, but he did issue an Opinion which was fatal to this case.

Judge Enslen never disclosed that there was a conflict of interest, that his wife is an attorney with the

law firm of Miller, Canfield, Paddock and Stone, which represented Comerica Bank.

Further, in double checking under Federal Rule 6(a), the appeal was timely.

Federal Rule 6(a) states in part:

"In computing any period of time prescribed or allowed by these rules . . . The day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday . . . "

The time in us U.S.D.C. should have been computed as follows, according to the 1985 calendar:

August 7, 8, 9, 12, 13, 14, 15, 16, 19, 20.

The Court clearly erred in computing the time. Rosenberg's appeal was filed on the 10th day, which is within the time period allowed.

A sale was held the following day after Judge Enslen's Opinion, over my objection that I was going to appeal his ruling.

They Denied me the right to bid on these properties at the sale.

One-and-one-half (1-1/2) years later I discovered that Judge Enslen's spouse was, and still is, employed as an attorney with the law firm which represents Comerica Bank.

I asked Judge Enslen to recuse himself. Again, he denied my request to do so and issued an Opinion. (If he would recuse himself, it would harm the Comerica Bank, who bought the property at the sale and resold it). Comerica Bank made a handsome profit. A Bank with Eleven and one-half (11-1/2) Billion Dollars of assets would be hurt! At no time did he feel bad by taking a man's property away, which he worked for 31 years to accomplish an American dream. Something he should have for his old age and something for his children.

Judge Enslen let the Bank come in and take a false position and declared that they were still a secured creditor and robbed me of all of it and

allowed them to sell it and make a handsome profit. Again, justice was denied me.

Judge Enslen's denial and his conflict of interest was appealed to the 6th Circuit Court of Appeals. The 6th Circuit Court of Appeals did not investigate Judge Enslen properly according to 28 USC 372 to the best of my knowledge, for his conflict of interest and they denied my appeal saying it was untimely.

The 6th Circuit Court of Appeals pointed out that all documents to the appeal were timely submitted, except there was a cashier's check and that was not signed. They returned the cashiers check only for my signature, which I signed immediately and returned to them.

I feel that should not be considered and untimely filing. I feel that should be considered a clerical error and the appeal should not be denied as untimely. I fell the 6th Circuit Court of Appeals was wrong in doing this. I, therefore, feel that justice was denied to me again.

CONCISE STATEMENT

I, David Rosenberg, was in the scrap metal business for thirty-one (31) years and was always very successful. In 1978 I added on to my business an automobile shredder which cost in excess of $1,000,000. I got a loan of $550,000 from the Small Business Administration through Comerica Bank. In late 1978 this machine went into production to shred and process automobiles and appliances and other metallics.

This machine was highly productive and I had no problem making my payments until early in 1979.

I started having problems with the City of Kalamazoo over the operation of this machine. The problem turned out to be a city Commissioner, who was also an attorney, and he was representing a client of his to put in a similar operation about 12 miles from my place of business. He started creating all kinds of problems which were unfounded. In the meantime, he had the City of Kalamazoo get court orders to shut

my machine down from operating and also they took my license away.

In 1980 I filed a Chapter 11 petition with the Bankruptcy Court to protect myself from all of the legal hassles which I had with the City.

In 1982 Comerica Bank recalled their loan from the Small Business Administration and the Small Business Administration paid them off. At no time did Comerica Bank notify me, the creditor, nor the court, nor my attorney, that they were no longer a secured creditor, as under Rule 8 of the S.B.A. loan it clearly states that they should have turned over all of their documents back to S.B.A. and they had no right to bother me or the S.B.A.

Instead, the Comerica Bank started up the harassment in the Bankruptcy Court and through the City of Kalamazoo. The Mayor of the City at that time (Frances Hamilton) was an officer of Comerica Bank. So, therefore, they had overwhelming power to harass me in the Bankruptcy Court and through the city with no end, and always took the position that they were a

secured creditor, which they were not, until they finally succeeded in converting this business into a Chapter 7. They claimed a security interest of $1,160,000 and showed an appraisal of $350,000.

The trustee abandoned the property and gave twenty (20) day proper notice that if there was no objection to the abandonment, the property was abandoned. Under Bankruptcy Rule 554 I took possession back of the property. As debtor, I was entitled to possession under the abandonment.

Seven (7) months later Comerica Bank, under Federal Rule 60(b) filed a Petition to Set Aside the Abandonment. The Bankruptcy Court granted the petition over my objection. Abandonment to the debtor in possessory interest is non-reversible. Therefore, the Court should declare Federal Rule 60(b) as non existent under the Bankruptcy Code. Rule 554 of the Bankruptcy Code under abandonment is non reversible.

The Bank bought the assets from the Bankruptcy Court and re-sold it and made a

handsome profit. I was not even allowed the right to bid and the sale.

Attorney Robert Wright, who was the attorney for the trustee, denied my right to bid on the property. Also, attorney Robert Wright joined the law firm of Miller, Canfield, Paddock and Stone, which is the law firm that represented the Comerica Bank. Again, it shows that there was fraud involved.

Once the property was abandoned, I did not have any attorney. The Bankruptcy Court disregarded all rules and regulations which were appealed by myself acting in pro per.

REASONS FOR GRANTING THE WRIT

ARGUMENT

1. Certiorari should be granted as I, Rosenberg, acted in pro per and the courts were procedurally in violation of the aforegoing rules stated.

Even the intervening rights of a third person who has bought the property, or a part of it, from the original purchaser may not be sufficient to prevent the setting aside of a fraudulent or irregular sale, where the circumstances indicate knowledge or complicity on the part of such third person, or, assuming his innocence, it is possible to restore him to his original situation. In Re Frazin & Oppenheim, C.C.A.N.Y. 1910, 181 F 307, 24 Am. Bnkr. Rep. 598. See also, In Re Finlay, D.C.N.Y. 104 F. 675, 4 Am.Bnkr.Rep. 745; In Re Stevenson, D.C. Pa. 1881, 6 F. 710

It clearly shows that the Courts had total disregard of my rights. I acted in pro per.

The claim of the Bank was not justified. They failed to produce any evidence of their claim at the trial.

It clearly shows that this sitting aside of the abandonment was illegal. The intervening by the Bank was illegal. The intervening by the U. S. District Court, when his spouse was a partner in the law firm which represented the Bank was immoral of judicial ethics and the accepting of $2500 from the Bank by the trustee and his attorney is highly questionable.

It clearly shows that this case from start to finish was plugged with illegal and unethical conduct by all parties because they expected to get away with it while I was appearing in pro per.

This is the only remedy that I, David Rosenberg, have left in this litigation which left me, after 31 years in business, with nothing unless this Honorable Court grants certiorari.

" . . . . remedy may be reasonable after several years . . . ."

United States v. Holtzman, 762 F2d 720 (CA 9,) 1985

CONCLUSION

This machine was producing $650,000 a month revenue with a net profit before taxes of $200,000 per month. Average life span of this machine is 20 years, which would generate over $40,000,000 worth of profit. Therefore, it clearly shows the damage Comerica Bank inflicted upon me is in excess of $40,000,000.

I, therefore, ask this Honorable Supreme Court to consider these figures and award damages accordingly.

The 6th Circuit Court of Appeals should not have denied my appeal as untimely because of a cashier's check not being endorsed. That was a clerical error. They should have granted my appeal under 28 USC 2111 Harmless Error.

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgement after an examination of the record without regard to errors or

defects which do not affect the substantial rights of the parties."

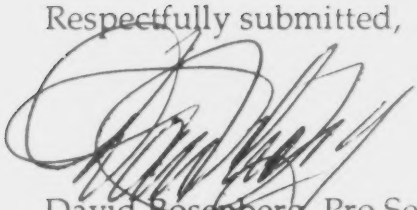
RELIEF PRAYED FOR

I feel a great injustice has been done. I feel that Judge Enslen should have recused himself as beyond a doubt, there was a conflict of interest and by refusing to recuse himself I am asking this Honorable Court to correct that recusal and award me all of the damages which I suffered through the hands of Comerica Bank.

I pray that this Honorable Supreme Court will rule and reverse on this great injustice, in my favor, and have Comerica Bank pay all of the profits to me, along with interest and costs because of their interference and denial of my right to my properties.

I further pray that this Honorable Court will not deny me justice like I have been denied in the past and grant me Certiorari so that this Honorable Supreme Court will hear this case and correct all of the unjust rulings which were ruled against me in the lower courts. This is my last hope to regain faith in the American justice system.

Respectfully submitted,



David Rosenberg, Pro Se
630 Alfa Court, 3A
Kalamazoo, MI 49002

1-616-343-7130

CERTIFICATE OF SERVICE

I, David Rosenberg, Pro Se, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, two (2) true and correct copies of the foregoing Petition for Certiorari to the Court of Appeals for the Sixth Circuit to the following:

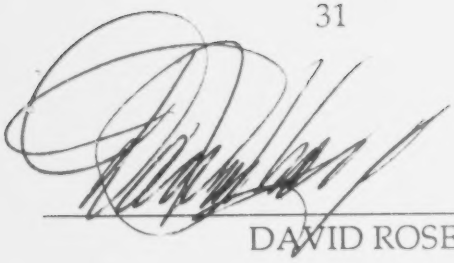
Office of the Clerk
United States Court of Appeals
Sixth Circuit
Cincinnati, Ohio 45202-3988

Honorable Richard Enslen
United States District Court for the
Western District of Michigan
149 Federal Building
Kalamazoo, MI 49007

James G. Vantine, Jr., Attorney for
Comerica Bank
Miller, Canfield, Paddock and Stone
444 West Michigan Avenue
Kalamazoo, MI 49007

Lawrence M. Brenton, Attorney at Law
900 Comerica Building
Kalamazoo, MI 49007

This is the 21 day of June, 1989.



DAVID ROSENBERG

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of:
SUPERIOR METAL SHREDDER, INC
DAVID ROSENBERG
File No. K85-458

Debtor

AS STYLED BY DAVID ROSENBERG IN THE INSTANT MOTION:

DAVID ROSENBERG,
Plaintiff/Appellant,
File No. K85-458

v.

COMERICA BANK
and Patrick H. Farrell,
Defendants/Appellees.

OPINION

Appellant, David Rosenberg, has filed a motion to stay the proceeding of the sale of certain property pending appeal, pursuant to Bankr. R. 8005. Prior to the discussion of this motion, a brief explanation of the long and tortured history of this case is appropriate. In 1980, the debtor corporation filed for Chapter 11 reorganization. In October 1984, the matter was finally converted to a Chapter 7 proceeding. On January 30, 1985, the trustee of the bankrupt estate gave notice as required by Section

102(1) of the Bankruptcy Code that certain real and personal property of the estate would be abandoned pursuant to section 554 as of February 14, 1985, unless a written objection to such abandonment was filed with the bankruptcy court prior to said date. On the date the the notice was issued, counsel for Comerica Bank, a creditor of the estate with a security interest in some of the assets, began negotiations with counsel for the trustee regarding the possible sale of the subject property to an interest third party. On February 13, at the eleventh hour, the trustee determined not to sell the assets to the third party on behalf of the estate. For whatever reason a timely objection to the abandonment was not filed by Comerica or any other interest party. Therefore, on February 14, 1984, title to the assets revested in the debtor. See In re Tarpley, 4 B.R. 145 (Bankr. M.D. Tenn. 1980)

On April 30, 1985, Comerica filed a motion in the bankruptcy court to set aside the order of abandonment and compel sale by the Trustee. A hearing on this motion was held before Hon. Lawrence E. Howard on June 21, 1985. Judge Howard recognized that most courts that have considered the issue have held that a knowing abandonment of property by the trustee under Section 554 is irrevocable, and property once abandoned cannot thereafter be brought back into the estate by the trustee. See e.g., In re Burch Co., 37 B.R. 273 (Bankr. D.S.C. 1983); In re Enriquez, 22 B.R. 934 (Bankr. D. Neb. 1982); In re Tarpley, supra. However, Judge Howard also noted that the court, as opposed to the trustee, has the ability to consider a motion for relief from its own order under Bankr. R. 9024. Rule 9024 provides that, except in factual situations inapposite to the case at bar, motions for relief from orders of

bankruptcy court shall be determined pursuant to Fed. R. Civ. P. 60. At the hearing, Judge Howard ruled that while relief from the order of abandonment was not justified under id. 60(b) (1), see Federal's, Inc. v. Edmonton Investment Co., 555 F.2d 557, 583 (6th Cir. 1977), relief was justified under the catchall provision of id. 60 (b) (6).
Transcript of Hearing at 33, In re Superior Metal Shredders, Inc., no. HK80-03369 (Bnkr. W.D. Mich. June 21, 1985). Specifically, he noted that the assets had been tied up in the proceedings for nearly five years, that maintaining the order of abandonment would only force the parties to seek foreclosure in state court (the result of which would greatly diminish the resale value of the property), and finally that no party would be unjustly prejudiced by returning the abandoned property to the estate. Accordingly, an order setting aside the abandonment pursuant to Fed. R. Civ. P. 60 (b) (6) was entered by the bankruptcy court on August 6, 1985. This order also compelled the sale of the assets by the trustee on behalf of the estate. That sale is currently scheduled to take place on November 8, 1985.

Appellant filed an objection to the order to set aside the abandonment on August 20, 1985. A hearing on that objection was again held by Judge Howard on September 13, 1985. Thereafter, an order denying Appellant's objection was entered on October 10, 1985. This time sequence is crucial. The August 6th order setting aside the abandonment, and directing the sale, of the assets constituted a judgement of the bankruptcy court. The objection to that order sought an amendment of that judgment. Bankruptcy Rule 9023 provides that motions for amendments of judgments under the Code are governed by Fed. R. Civ. P. 59. Rule 59(e) states that:

"[a] motion to alter or amend the judgement shall be served not later than 10 days after entry of the judgment." Compution of the 10 day period under Bankr. R. 9006 (a) reveals that the last day on which Appellant could file his objection to, or otherwise move to amend, the judgement of August 6, 1985, was Monday, August 19, 1985. Furthermore, Rule 9006(b) (2) specifically precludes any enlargements of time for taking action under Rule 9023. Therefore, Appellant's August 20th objection was untimely and the bankruptcy court's judgement of August 6 was final as to the setting aside of the abandonment and the direction to the trustee to sell the assets.

Mr. Rosenberg filed his appeal from the instant action with this Court on October 10, 1985. Title 28 of the United States Code, Section 158 (a), grants the district courts jurisdiction to hear appeals from actions of the bankruptcy courts. Section 158(c) provides, however, that such appeal must be taken within the time provided in Bankr. R. 8002. rule 8002(a), in turn, states that notice of appeal shall be filed within 10 days of the judgement or order appealed from. Since the Appellant's objection of August 20, 1985 was untimely, the judgement or order appealed from was the bankruptcy court's order of August 6, 1985.

Clearly, the October 8th notice of appeal was in excess of 10 days after the judgement or order appealed from. Moreover, none of the extensions provided for in 8002(c) apply to this case. Therefore, the appeals was not timely filed under Rule 8002 and the Court lacks jurisdiction to entertain the matter of the order setting aside the abandonment and compelling sale of the assets. 28 U.S.C. § 158 (a), (c).

Alternatively, had this appeal been timely filed, vesting this Court with jurisdiction under 28 U.S.C. § 158 (a), the Court still would have denied Appellant's

motion for stay pending appeal. In order to obtain a stay pending appeal under Bankr. R. 8005, the moving party must clearly establish each of the following: (1) that there is a likelihood that the moving party will be successful on the merits of his appeal; (2) that the movant will be irreparably injured unless the Court grants the stay; (3) that granting the stay will work no substantial harm to the other interested parties; and (4) the stay will not harm the public interest. In re Baldwin United Corp., 45 B.R. 385, 386 (Bankr. S.D. Ohio 1984). I specifically do not find that Judge Howard's findings of fact are clearly erroneous, Bankr. R. 8013, and the application of Bankr. R. 9024 and Fed. R. Civ. P. 60(b) (6) to those facts was appropriate. Accordingly, at least the first three prongs of the Baldwin test for granting stays pending appeal are not met.

For these reasons, Appellant's motion is denied and the case is dismissed. Should Mr. Rosenberg choose to file an appeal from subsequent orders or judgements of the bankruptcy court, new and timely notices of appeal must be properly filed. Bankr. R. 8002 (b); 8 U.S.C. § 158(a), (c). An appropriate judgement order shall be entered forthwith.

Dated in Kalamazoo, MI:

_____

Richard A. Enslen
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In the matter of:

SUPERIOR METAL SHREDDER, INC.,
DAVID ROSENBERG File No. K85-458

Debtor

JUDGEMENT ORDER

In accordance with the written opinion filed this date, and for the reasons stated therein;

IT IS HEREBY ORDERED that Plaintiff's motion to stay proceeding of sale pending appeal is DENIED.

IT IS FURTHER ORDERED that this case shall be, and hereby is, DISMISSED

DATED in Kalamazoo, MI:

_____

RICHARD A ENSLEN
U.S. District Judge

APPENDIX II

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of
SUPERIOR METAL SHREDDER, INC
DAVID ROSENBERG File No. K85-458

Debtor

_____/

AS STYLED BY DAVID ROSENBERG IN THE INSTANT MOTION:

DAVID ROSENBERG,

Plaintiff/Appellant, File No. K85-458

v

COMERICA BANK
and
PATRICK H. FARRELL,

Defendants/Appellees.

_____/

OPINION

Presently before this Court is "plaintiff" David Rosenberg's motion to vacate and set-aside prior order of dismissal pursuant to Federal rule of Civil Procedure 60(b) (6). Both "defendants" Comerica Bank ("Comerica") and Patrick J. Farrell ("Farrell") have filed responses to "plaintiff's" motion. The procedural and factual background to this case is somewhat complex and was previously presented in more detail in the Court's opinion of November 7, 1985. Accordingly, the Court will highlight the relevant points along the procedural timeline in summary fashion.

The "plaintiff" (as Mr. Rosenberg styles himself) was the president and sole shareholder of Superior Metal Shredders, Inc. ("Superior"). Superior filed a petition pursuant to Chapter 11 of the Bankruptcy Code in October, 1980. In October, 1984, the case was converted to a Chapter 7 proceeding. On August 6, 1985, the bankruptcy court entered an order setting aside a prior abandonment of Superior's assets by the Chapter 7 trustee, which permitted the sale of Superior's assets by the trustee. On October 10, 1985, Rosenberg filed an appeal of order and brought a motion in this Court to stay the sale of Superior's assets pending appeal.

Bankruptcy Rule 8002 requires that a notice of appeal be filed within ten (10) days of the judgment or order appealed from. This Court held that the August 6, 1985, bankruptcy court order was, in fact, a final order from which the appeal was taken. The appeal itself was filed on October 10, 1985. Accordingly, on November 7, 1985, this Court held that it had no jurisdiction to hear the appeal, denied Rosenberg's motion and dismissed the appeal. The Court's opinion also indicated that, even assuming that the

Court had jurisdiction, the grounds for appeal were without merit.

Comerica purchased Superior's assets through a court-ordered bankruptcy sale on November 8, 1985. Comerica then resold the assets to a corporation which is owned in part by Mr. Farrell. Mr. Farrell has apparently used the assets in his business since that time and has invested substantial amounts for repairs and additions to the assets. Rosenberg also filed an appeal of the order approving the sale and requested a stay of the transfer of sale proceeds pending appeal. That second appeal also contained allegations that were almost identical to those of the first appeal which was filed with this Court. The second appeal was assigned to U.S. District Court Judge Benjamin F. Gibson who denied plaintiff's motion for stay pending appeal and dismissed the remainder of the appeal. Judge Gibson's decision was later affirmed by the United States Sixth Circuit Court of Appeals and certiorari was denied by the United States Supreme Court.[1]

It is worth noting that the Sixth Circuit agreed with Judge Gibson that "all but one of the issues raised in the second appeal had been adjudicated in the first appeal, and were therefore res to the second appeal. Only the issue of whether the sale of assets should be stayed pending appeal was not resolved in the first appeal, as the sale had not been consummated at that time." Rosenberg v. Comerica Bank-Kalamazoo, No. 86-1273, slip. op. at 4 (6th Cir. May 7, 1987) (emphasis added). The Sixth Circuit

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[1] Rosenberg v. Comerica Bank-Kalamazoo (In Re Superior Metal Shredders, Inc.), affirmed per curiam, No. 86-1273 (6th Cir. May 7, 1987), rehearing denied, No. 86-1273 (6th Cir. Oct. 7, 1987), cert. denied, 56 U.S.L.W. 3570 (U.S. Feb. 23, 1988).

went on to hold that "Rosenberg's failure to obtain a stay of the November 8 ,1985 sale of assets [was] fatal to the only remaining issue in his appeal of the district court's [Judge Gibson's] February 10, 1986 disposition of his second appeal." Id.

The full procedural history of this case is set forth in more detail in Rosenberg v. Comerica Bank-Kalamazoo, supra. In the face of the Sixth Circuit's ruling that "the overwhelming majority of issues raised in the second appeal were barred by res judicata" (Id.), Mr. Rosenberg was faced with the problem of how to appeal yet a "third time" the decisions of the bankruptcy court as well as the decision of this court from which Mr. Rosenberg never appealed. Put differently, Mr. Rosenberg was faced with the difficult problem of "rewriting" the procedural history of this case in order to sidestep the Sixth Circuit's res judicata ruling.

As the Sixth Circuit noted in its opinion of May 7, 1987, "Rosenberg has made a variety of efforts to prevent and then undo [the bankruptcy court's sales of assets] culminating in this appeal." Id. at 2 (emphasis added). Mr. Rosenberg continues with those efforts and his energy level is apparently undefatigable in that he is now, once again, knock, knock, knocking on the courthouse door.

Not one to take "no," or even "No! No!" for an answer, Mr. Rosenberg has embarked on a rewriting of the history of this case that would make even the most unabashed revisionists blush. Interestingly, he employs a tactic often employed by radical revisionists: attack the objectivity of the reporter of events and/or invent facts that tend to support one's special "reading" of past events. In this case, Mr.

Rosenberg's "historical analysis" suggests that this Court's jurisdictional ruling--a non-discretionary ruling--was somehow "biased." Mr. Rosenberg does not, apparently, understand that this Court's November 7, 1985 Opinion did not reach the merits of his appeal, but rather addressed only the issue of whether this Court had jurisdiction.

It is worth noting that Mr. Rosenberg has used so many different "legal aliases" in appealing these same issues over and over again that it is apparently difficult for him to keep the captions and procedural postures straight. This case, No. K85-458, was originally entitled as follows:

In the Matter of:

SUPERIOR METAL SHREDDER, INC.

DAVID ROSENBERG,

Debtor

The caption of Rosenberg's appeal as styled by him was:

In the matter of:
SUPERIOR METAL SHREDDER, INC.

DAVID ROSENBERG,

Debtor

DAVID ROSENBERG,

Plaintiff,

v.

JUDGE LAURENCE HOWARD,

TRUSTEE RICHARD REMES,

Defendants.

In the new 1988 pleadings filed by Mr. Rosenberg, he styles the case thusly:

DAVID ROSENBERG,
Plaintiff,
File No K85-458

v.

COMERICA BANK
and
PATRICK FARRELL,
Defendants.

Hence, in K85-458, Mr. Rosenberg now apparently believes that he is the plaintiff, and the Comerica Bank and Patrick H. Farrell are the defendants. It may be that Mr. Rosenberg's "legal-identity problems" stem, in part, from the fact that the true party in interest in the underlying bankruptcy was Superior. Although Mr. Rosenberg was the president and sole shareholder of the corporation, the order setting aside abandonment from which Mr. Rosenberg appealed concerned only the corporation. It is true that in February of 1985 after the trustee abandoned the assets of Superior, they "reverted without objection to [Superior] and thus to Rosenberg." Id. at 3. However, on August 6, 1985, the bankruptcy court ordered the abandonment set aside. An August 29, 1985, Mr. Rosenberg filed an "objection" to that order, and on October 8, 1985, of course, Mr. Rosenberg filed a notice of appeal from the August 6, 1985 bankruptcy order with this Court. It is not at all clear to the Court that Mr. Rosenberg as the representative agent of a dissolved entity, has standing to bring this action in that he was never technically the "plaintiff" in the bankruptcy action--despite his "creative captioning." For the purposes of this opinion, however, the Court will assume that Rosenberg somehow does have standing.

Further, the record supports the observation that virtually every piece of litigation in which Mr. Rosenberg has been involved concerning Superior, results in the naming of every judicial officer who makes any decision which is adverse to the interest of Mr. Rosenberg as a defendant and/or in the saddling of those officers with charges of "bias." Defendant Comerica's brief informs the Court of Mr. Rosenberg's charge of bias on the part of Kalamazoo County Circuit Judge Robert L. Borsos, who, in a related case, entered judgment in favor of Comerica and against Rosenberg in the amount of $115,129.85. Mr. Rosenberg's subsequent appeal from Judge Borsos's denial of his motion for relief from judgment was denied by both the Michigan Court of Appeals and the Michigan Supreme Court. See Defendant Comerica's Brief at 6, n. 2.

Mr. Rosenberg now seeks to have this Court vacate its order of November 7, 1985 because he alleges that under 28 U.S.C. § 455 the Court's failure to disqualify itself at the time the order was entered justifies relief from the final judgment pursuant to Federal Rule of Civil Procedure 60 (b) (6).

Timeliness of Plaintiff's 60 (b) (6) Motion

The order Mr. Rosenberg seeks to have set aside was entered almost three years ago. It has been said that "[s]ince what is a reasonable time must be determined in light of all attendant circumstances, intervening rights, loss of proof or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant facts bear upon the problem." 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 60.27 [3] (2d ed. 1987).

The Court notes that in reliance upon its order of November 7, 1985, defendant Comerica purchased Superior's assets through the bankruptcy court and resold then to a new owner who has since injected substantial amounts of capital into the business. Moreover, it appears that Rosenberg knew of the "facts" which allegedly justify his 60 (b) motion at least six months prior to the time he filed it because he raised the same disqualification issue in his petition for writ of certiorari in the Supreme Court of the United States dated December 21, 1987. He waited to bring this motion until he received the "bad news" on his petition for certiorari. Mr. Rosenberg never appealed this Court's order of November 7, 1985. It is clear that he is now, almost three years later, seeking to improperly use his Rule 60(b) motion as a substitute for an appeal. Cf. Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 188-89 (&th Cir. 1985) (holding that pro se plaintiff's 60(b) (6) motion "appears to be an attempt to remedy his earlier omission in [the trial court] proceeding rather than to be motivated from some exceptional circumstances.").

In addition, when the Court considers the "intervening rights" of the third parties here--that is, Mr. Farrell whom Mr. Rosenberg has ironically labeled as a "defendant" in this 1985 action, together with the rights of Comerica and other businesses which has dealt with Mr. Farrell and Comerica--as well as the need for finality, it is clear that under the factual circumstances of this case, Rosenberg's motion cannot be said to have been brought within a reasonable time.

The Substantive Requirements of Rule 60(b)

In Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986) the Seventh Circuit noted that relief under Rule 60(b) (6) is " . . . warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgement was unjust." The plaintiff in Margoles argued that an assistant state attorney general, during the time of the trial judge had served as attorney general, had communicated with defendant newspaper's counsel in plaintiff's previous slander suit and had exchanged certain documents containing information concerning that suit. Although the court noted that some of the documents concerned information which related to the production of certain documents for use in the proceeding concerning plaintiff's 60(b) motion and/or related to other litigation brought by plaintiff, It concluded that the documents were either totally inconclusive with respect to the nature of the "relationship" between the trial judge and the defendant's counsel and/or were "patently innocuous." Margoles, 798 F.2d at 1073.

The Margoles court found that "the documents of record shed absolutely no light on whether the information requested or provided was relevant to any material factual issues that might have been disputed in the instant action. Therefore the existence of this 'relationship,' if such it be, does not present the 'extraordinary circumstances' necessary to warrant relief under rule 60(b) (6)." Id. at 1074. Finally, the court emphasized that "[e]ven assuming that [the trial judge] knew of these activities and the communication between his office and counsel for the defendants in the underlying slander case, the evidence and reasonable inferences drawn from it are woefully

inadequate to warrant relief under Rule 60(b) (6)." Id. (emphasis added).

Here, Mr. Rosenberg asserts that "the close relationship between this Court and an attorney of the firm representing the opposing party"--even where Mrs. Enslen was and is not a partner and where she performed absolutely no legal services whatsoever in K85-458 --somehow resulted in the Court being biased in dismissing his bankruptcy appeal nearly three years earlier based upon Rosenberg's failure to tile a timely appeal. Here his assertions of a "prejudicial relationship" and/or "biased decision-making" in the context of a non-discretionary decision is more speculative and tenuous than that presented in Margoles. See also Albright v. R.J. Reynolds Tobacco Company, 463 F. Supp. 1220 (W.D. Pa. 1979) (rejecting plaintiff's 60 (b) (6) motion and holding that an allegation of bias in a dismissal based on failure to meet the jurisdictional amount was purely speculative).

Mr. Rosenberg has simply failed to present any evidence to warrant an inference that there was substantial danger that the underlying judgment in this case was somehow unjust. The Court finds this to especially true given the strong policy favoring the finality of judgments in civil cases. It is well settled that "[j]udgment in civil cases fix the rights of parties and entitle them to go about their lives [and] may be reopened only for extraordinary reasons." Meltyn Realty Corp. v. Esmark, Inc., 763 F.2d 447 (6th Cir. 1984).

The Timeliness of Rosenberg's Recusal Motion

The Sixth Circuit has indicated that a motion for recusal should be timely filed. Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984). In In re Bokum Resources Corporation, 26 Bankr. 615 (D.N.M. 1982), the district court held that the appellant's § 455 motion was untimely where appellant knew the facts which established the basis for his motion more than a month before he filed it.

Rosenberg knew of the "facts" which allegedly justify his 60(b) motion at least six months prior to the time he filed it because he raised the same disqualification issue for the first time in his petition for writ of certiorari in the Supreme Court of the United States dated December 21, 1987. Accordingly, the Court finds that Rosenberg's recusal motion is itself untimely.

The Recusal Motion

This Court is no longer certain that Mr. Rosenberg is pursuing recusal because in his Answer to Briefs Filed by Defendants Comerica Bank and Patrick Farrell, filed July 13, 1988 (6pp), he does nt refer to recusal even once. Moreover, in his Memorandum attached to his Motion to Vacate . . he asks the Court to (1) set aside it previous order; (2) disqualify itself; (3) set the matter for a status conference before a different judge. Thus, he seeks action first (not recusal) before he seeks disqualification. This request, like the styling of the various pleadings, causes this Court to be uncertain what Mr. Rosenberg seeks.

However, since at one time, at least, he did seek recusal under 28 U.S.C. § 455, some analysis seems appropriate. That statute, in part, provides:

> (a) Any . . judge . . shall disqualify himself in any proceeding in which his impartiality might be reasonable be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: . .
>
> (4) He knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or person within the third degree of relationship to either of them, or the spouse of such a person: . . .
>
> (ii) Is acting as lawyer in the proceeding; . . .

It is clear that subsection (a) of § 455 sets out an "objective standard" for determining whether disqualification is required. On the other hand, subsection (b) sets out specific circumstances in which a judge must disqualify himself.

The Supreme Court has quite recently decided a case which is instructive in the matters presented to this Court. In Liljeberg v. Health Services Acquistion Corp., 56 U.S.L.W. 4637 (June 17, 1988) the Supreme Court noted that § 455(a) can be violated based upon an appearance of impartiality, even though the judge was not conscious of the circumstances creating the appearance of impropriety, and that relief is appropriate under Rule 60(b) even when such

violation is not discovered until after the judgement has become final.

Liljeberg held that:

> [S]ection 455 does not on its own, authorize the reopening of closed litigation. However, . . . Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgement. IN particular, Rule 60(b) (6) . . . grants federal courts broad authority to relieve a party from a final judgement "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b) (1) through (b) (5) . . . Rule 60(b) (6) relief is accordingly neither categorically available or categorically unavailable for all § 455 violations. We conclude that in determining whether a judgment should be vacated for a violation of §455 it is appropriate to consider the risk of justice to the parties in the particular case, the risk that the denial for relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Liljeberg, 56 U.S.L.W. at 4642 (emphasis added). In the case before me, the Court does not believe that Rule 60 (b) (6) ought to be invoked simply because plaintiff's motion has not been brought within a reasonable time. Moreover, because of the non-discretionary nature of the original decision, under the guidelines set forth in Liljeberg, the Court concludes it would have to deny plaintiff's motion.

An assessment of the "risk of injustice to the parties" mandates that result. It is clear that Comerica purchased Superior's assets through a court-ordered bankruptcy sale. Moreover, Comerica then resold the assets to a corporation which is owned in part by Mr. Farrell. Mr. Farrell, as the court has previously noted, has used those assets in his business since that time and has invested substantial amounts of money for repairs and for additions to the assets. Although Rosenberg never appealed the decision of the Court, he did appeal subsequent decision of the bankruptcy court with respect to the sale of Superior's assets and took those appeals though to the United States Supreme Court. He lost all of those appeals. The Court believes that Rosenberg is now seeking to collaterally attack those decisions.

Even if he had a colorable § 455 motion before this Court, It is clear that applying the standards outlined in Lilejeberg, granted his Rule 60(b) motion would bring about a grave injustice to the parties who have relied upon previous decisions of other courts as well as the November, 1985 opinion and order of this Court. Vacating a nondiscretionary decision based upon Rosenberg's § 455 claim would undermine the public's confidence in the judicial process to the extent that the public would no longer be able to rely on the finality of decisions.

It is worth noting that Liljeberg emphasized that even where it appears that it would be appropriate to vacate a judgement based on a section 455 violation, the judgement should not be vacated if "the party making the motion . . . did not make a timely request for relief, or [where it it shown] that it

would otherwise be unfair to deprive the prevailing party of its judgment." Liljeberg, 56 U.S.L.W at 4643.

Finally, this Court holds that Rosenberg has failed to allege facts sufficient to bring this matter within the specific circumstances requiring recusal under § 455 (b). It is clear that "[b}y its very terms the disqualification cited [§ 455(b) (5) (ii)] is applicable only when the relative is acting as a lawyer in the proceeding." Wilmington Towing Company, Inc. v. Cape Vera Towing Company, Inc., 624 F. Supp. 1210, 1211 (E.D.N.C. 1986) (emphasis in original). It is clear that there has been no participation by Mrs. Enslen in any aspect of this case during the time it was before me. Accordingly, this situation does not come within the prohibition set forth in § 455(b) (5) (ii). Section 455(b) (4) requires a recusal where a judge or his spouse has a financial interest in the outcome of a proceeding. It is well settled that an associate in a law firm, as opposed to a partner, does not have the requisite financial interest in the outcome of the proceeding to warrant judicial disqualification based on his or her relationship with the judge. See e.g., United States ex. rel. Weinberger v. Equifax, Inc. 557 F.2d 456, 463 (5th Cir. 1977), cert. denied 434 U.S. 1035 (1978) Because Mrs. Enslen was an associate attorney and not a partner, prohibitive financial interest does not exist.

Rosenberg's pleadings arguable suggest that because Mrs. Enslen was a former law clerk of this Court that the relationship itself would give the appearance of impropriety under these facts, even though she did not work on his appeal. However, it is clear that the mere fact that an attorney was a judge's former law clerk is insufficient to support a motion for

disqualification. In Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984), the Tenth Circuit held that in a section 1983 action the trial court judge properly refused to recuse himself even though his former law clerk was one of the defendant's trial counsel and had handled the probate of estate of the judge's deceased mother during the discovery phase of the section 1983 case. The Varela court noted that there was nothing unusual in the probate proceeding and that the judge was not a client of the attorney. Further, the court emphasized that the judge did not appear to be a client of the attorney merely because he was a beneficiary under his mother's will.

In the case sub judice, Rosenberg has failed to allege any nexus between the complained of relationship and the issues presented in his appeal of the bankruptcy order. Accordingly, his "automatic recusal" argument is patently without merit.

In the context of numerous adverse rulings from the bench it has been said that "[the recusal statute] was never intended to enable a litigant to oust a judge for adverse rulings made, for such rulings are reviewable otherwise . . ." (citation omitted). Further, "[a] trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor one one litigant, he may have created the impression of bias . . . 'A timid judge, like a biased judge is intrinsically a lawless judge.' [citation omitted]" In Re Bokum Resources Corp., 26 Bankr. at 621 citing In re International Business Machines Corp., 618 F.2d 923, 939 (2d Cir. 1980).

A fortiori, a judge must be able no make non-discretionary [jurisdictional] rulings without fear of

speculative assertions of bias based upon the mere existence of private relationships--especially where those relationships have no connection between those relationships and the parties is remote at best.

In conclusion, because the Court finds that Rosenberg's § 455 motion is without merit, because his recusal claim and his 60 (b) (6) motion appear to be untimely, and under the authority of Liljeberg, the Court will enter an order denying Rosenberg's motion to vacate and set aside.

DATED in Kalamazoo, MI:_____

July 27, 1988

Richard A. Enslen

U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRIC OF MICHIGAN

In the matter of

SUPERIOR METAL SHREDDER, INC.

DAVID ROSENBERG File No. K85-458

Debtor

AS STYLED BY DAVID ROSENBERG IN THE INSTANT MOTION:

DAVID ROSENBERG,

Plaintiff/Appellant File No. K85-458

v.

COMERICA BANK

and

PATRICK H. FARRELL,

Defendants/Appellees

JUDGMENT ORDER

In accordance with the opinion entered July 27, 1988;

IT IS HEREBY ORDERED that Rosenberg's motion to vacate and/or set aside prior order of dismissal under Rule 60 is DENIED

DATED in Kalamazoo MI _____

July 27, 1988

Richard A. Enslen

U.S. District Judge

APPENDIX III

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHGAN

In the Matter of:

SUPERIOR METAL SHREDDER, INC.
DAVID ROSENBERG File No. K85-458

Debtor

AS STYLED BY DAVID ROSENBERG IN THE INSTANT MOTION:

"DAVID ROSENBERG,

Plaintiff/Appellant, File No. K85-458

vs.

COMERICA BANK

and

PATRICK H. FARRELL,

Defendants/Appellees.[sic]"

OPINION

Currently before this Court is David Rosenberg's petition for writ of mandamus for recusal under 28 U.S.C. § 1361 (1983). The lengthy procedural background to this case may be found in the Court's Opinions of November 7, 1985 and July 27, 1988.

Even though Mr. Rosenberg has, once again, not styled case number K85-458 in an appropriate fashion, but has rather styled it in a fashion which he deems appropriate, he continues to use the original file number of K85-458, which is correct. On this filing, Mr. Rosenberg uses further ingenuity by deciding to "change judges." He, therefore, types in the name "Honorable Douglas W. Hillman" on the petition even though the case has been assigned to the undersigned since 1985. The Clerk of the Court thus, properly, sent the petition to the judge to whom it has always been assigned.

Title 28 of the United States Code. entitled "Judicial Code and Judiciary," grants original jurisdiction to the federal district courts concerning "any action in the nature of mandamus to compel an office or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1983).

The relevant words in the statute are "an office or employee of the United States or any agency thereof." Neither Judge Hillman, nor the undersigned, are within this statutory category. It is clear that under § 1361, neither of us, both federal district judges, have the power to grant a writ of mandamus against the other or against any other judge of Article III status; nor may we grant such writs against ourselves. See e.g., In re Charge of Judicial Misconduct, 700 F.2d 1391, 1392 (9th Cir. 1970).

I will therefore treat Mr. Rosenberg's inappropriately styled petition for a writ of mandamus as a motion to reconsider this Court's decision on his most recently filed motion under Federal Rule of Civil Procedure 60(b). For all the

reasons state in my Opinion of July 27, 1988, the motion for reconsideration is denied and, of course, does not affect the finality of the 1985 judgment, nor does it suspend its operation.

DATED in Kalamazoo, MI:_____

September 7, 1988

Richard A. Ensley

U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

In the Matter of

SUPERIOR METAL SHREDDER, INC.
DAVID ROSENBERG File No. K85-458

Debtor

AS STYLED BY DAVID ROSENBERG IN THE INSTANT MOTION:

"DAVID ROSENBERG,

Plaintiff/Appellant, File No. K85-458

vs.

COMERICA BANK

and

PATRICK H. FARRELL,

Defendants/Appellees.[sic]"

ORDER

In accordance with the opinion entered September 7, 1988;

IT IS HEREBY ORDERED that Mr. Rosenberg's motion is DENIED.

DATED in Kalamazoo, MI: _____

September 7, 1988

Richard A. Enslen

U.S. District Judge

APPENDIX IV

88-1997

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In Re:

David Rosenberg,

Plaintiff-Petitioner

Before: ENGEL, Chief Judge; WELLFORD and BOGGS, Circuit Judges.

The petitioner has submitted to this Court a document entitled "Petition for Writ of Mandamaus for Recusal Under Title 28 Sec. 1361." Therein, he asks this Court to remove District Judge Richard A. Enslen of the Western District of Michigan from a civil proceeding therein and to vacate a 1985 order entered by Judge Enslen. In response to the above petition, the district court has submitted copies of two recent orders entered in that civil proceeding.

The underlying civil action arose in bankruptcy proceedings. In 1985, the bankruptcy court entered an order setting aside a prior abandonment of the debtor's assets, thereby permitting their sale by the trustee. Judge Enslen dismissed an appeal therefrom on grounds the appeal was untimely. Judge Enslen also indicated the appeal was without merit. In 1988, the petitioner filed a motion to vacate that order under Rule 60(b), Federal Rules of Civil Procedure, on

grounds Judge Enslen should have recused himself in 1985.

Judge Enslen entered an order on July 27, 1988, denying the motion to vacate on grounds (1) the motion was not brought within a reasonable time, (2) the motion had no substantial basis, (3) the suggestion of recusal was itself untimely, and (4) there was no bases for recusal. The petitioner then filed a petition for a writ of mandamus for recusal under § 1361. Judge Enslen, holding that § 1361 could not be used for such purposes, treated the petition as a motion for reconsideration of the July order and denied relief. That order was entered on September 7, 1988. The present petition was filed in this Court on October 13, 1988.

To the extent the petitioner seeks an order from this Court requiring Judge Enslen to recuse himself from the proceedings below, his petition must be construed as a petition for a writ of mandamus under 28 U.S.C. § 1651. This Court has repeatedly held, however, that issues pertaining to recusal will not be reviewed by this Court *via* a mandamus petition. *See In re City of Detroit*, 828 F.2d 1160, 1165-67 (6th Cir. 1987), and cases cited therein. We are therefore not called upon to decide whether or not, under the circumstances and because of his wife's position, Judge Enslen was required to recuse himself.

To the extent the petitioner seeks review of the order denying his Rule 60(b) motion, the proper course would have been to file a direct appeal from that order. *See Peake v. First National Bank and Trust Company of Marquette*, 717 F.2d 1016, 1020 (6th Cir. 1983)(the denial of a Rule 60(b) motion is appealable). A mandamus petition cannot be used as a substitute

for an appeal. *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per Curiam), *cert denied*, 449 U.S. 834 (1980). Because the present petition was filed more than thirty (30) days after entry of the September 7 order, we likewise cannot construe it as a notice of appeal mistakenly filed in this Court. *See* Rule 4(a)(1), Federal Rules of Appellate Procedure.

It therefore is **ORDERED** that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX V

No. 88-1997

United States Court of Appeals for the Sixth Circuit

In re: David Rosenberg,

Plaintiff-Petitioner

Before: ENGEL, Chief Judge; WELLFORD and BOGGS, Circuit Judges

On November 17, 1988, this court entered an order denying the petitioner's mandamus petition in which he sought the retroactive disqualification of a district judge from 1985 bankruptcy proceedings. The petitioner seeks reconsideration of that order. He asks the Court not so much to reconsider the denial of mandamus relief, but to construe his petition as a notice of appeal.

The petitioner was the president and owner of a business whose assets were sold in bankruptcy proceedings. In 1988, the petitioner filed a motion to vacate judgement under Rule 60(b), Fed. R. Civ. P., asserting the district judge should have recused himself fro participating in certain proceedings in 1985 because of potential bias. The district court denied that motion on July 27, 1988.

Thereafter, on August 26, 1988, the petitioner filed in the district court a mandamus petition seeking the disqualification of the district court judge. The district court construed that petition as a motion for

reconsideration and denied it as such on September 7, 1988.

The petitioner then filed an almost identical mandamus petition with this court. This panel denied relief, holding that issues pertaining to the disqualification of district court judges could not be the subject of a mandamus action. We also noted the petitioner could have appealed the denial of the Rule 60(b) motion, but failed to do so. Finally, we observed that the mandamus petition itself could not be construed as a notice of appeal because it was not filed within 30 days of the order denying the motion for reconsideration.

In his present motion, the petitioner does not challenge our determination that his petition, as a mandamus petition, should be denied. Rather, he asserts his petition in fact was submitted to this Court within 30 days of the denial of reconsideration and thus should be construed as a notice of appeal erroneously filed in this Court. See Rule 4(a)(1), Fed. R. App. P.

An examination of our records shows the petitioner to be correct as to the submission of his petition herein. the petition was submitted on September 19, 1988, but was not filed at that time because the petitioner did not sign the accompanying money order. Thus, the actual filing of the petition did not occur until October 13, 1988.. These facts require us to re-examine in greater detail the possible basis for appeal.

As we noted in our prior order, the denial of a Rule 60(b) motion is a final order immediately appealable under 28 U.S.C. § 1291. The 30-day period

for filing the notice of appeal, therefore began to run on July 27, 1988. Because the petitioner did not file a notice of appeal (or anything that could be construed as a notice of appeal) by August 26, 1988, the crucial question is whether the mandamus petition filed in the district court on that date (and construed as a motion for reconsideration) tolled the time to file a notice of appeal.

Rule 4(a)(4), Fed. R. App. P., lists four types of motions which will toll the running of time to file a notice of appeal. One of these is a motion to alter or amend judgement under Rule 59(e), Fed. R. Civ. P. In this Circuit, motions for reconsideration are properly construed as Rule 59(e) motions. Huff v. Metropolitan Life Insurance Co., 675 F. 2d 119,122,(6th Cir. 1982). Such motions toll the appeal period, however, only if they are timely, i.e., served within ten days of the order for which consideration is sought. Peake v. First National Bank & Trust Co., 717 F.2d 1016, 1019, (6th Cir.. 1983) Here, the mandamus petition/motion for reconsideration was not served within that time and did not toll the period for filing a notice of appeal. The fact the district court ruled upon the untimely motion does not affect that conclusion. Denley v. Shearson/American Express, Inc., 733 F.2d 39, 41 (6th Cir. 1984). As a result, the mandamus petition submitted to this Court on September 19, 1988, even is construed as a notice of appeal, would impart no appellate jurisdiction herein. This Court has no authority to extend the 30-day period for filing a notice of appeal. Rule 26(b), Fed. R. App. P. We therefore decline the petitioner's request to construe his mandamus petition as a notice of appeal.

It is therefore **ORDERED** that the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

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CLERK